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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 774.

COUNTY OF ALLEGHENY,
Petitioner,

v.

MARYLAND CASUALTY COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement.

This is an action by the County of Allegheny, Commonwealth of Pennsylvania, Petitioner herein, against Maryland Casualty Company, herein called "Maryland", on a bond executed by Maryland as surety and Poole Engineering & Machine Company as principal, with respect to the performance by Poole of a contract dated March 26, 1931 with the Petitioner for the delivery of 1100 voting machines.

The action was commenced on March 23, 1937 in the Court of Common Pleas of Allegheny County, and was removed to the United States District Court for the Western District of Pennsylvania on April 13, 1937. On July 28, 1939, Petitioner filed its amended complaint (R. 3) to which Maryland filed its amended answer on December 21, 1939 (R. 62), and Petitioner filed a reply thereto on April 30, 1940 (R. 79).

The action was tried before Honorable Robert M. Gibson, District Judge, and a jury. The trial commenced May 5, 1941, and on May 31, 1941 the jury brought in a

verdict for Petitioner in the amount of $251,266.67, the amount of the bond with interest. The Court entered judgment thereon on May 31, 1941 (R. 1806). On June 9, 1941, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, Maryland made a motion to have the aforesaid verdict and the judgment entered thereon set aside and to have judgment entered in accordance with Maryland's motion for a directed verdict. There was joined with this motion for judgment a motion in the alternative for a new trial (R. 2153). On October 28, 1941, the District Court, by Gibson, D.J., entered an order vacating and setting aside the verdict and entering judgment for Maryland and against Petitioner (R. 2166) with an opinion filed the same day sur the motion (R. 2154), reported in 42 Fed. Supp. 672.

On November 14, 1941, on motion of Petitioner, said order of October 28, 1941 was vacated pending disposition of Maryland's motion for a new trial, on the ground that under *Montgomery Ward & Company* v. *Duncan,* 311 U. S. 243, such procedure was required (R. 2173), and the District Court filed an opinion memorandum in respect thereto (R. 2171) reported in 42 Fed. Supp. 677. Thereafter, on November 15, 1941, the District Court entered its order granting Maryland "a new trial alternative to its Motion for Judgment" (R. 2176), and filed an opinion memorandum sur the motion for a new trial (R. 2174), reported in 42 Fed. Supp. 678. On the same day, November 15, 1941, it entered an order vacating and setting aside the verdict in favor of the Petitioner and giving judgment for Maryland against Petitioner (R. 2177). Petitioner filed notice of appeal February 9, 1942 from the final judgment entered November 15, 1941 and stated in said notice of appeal "and further, that, in this appeal from said final judgment, plaintiff will also

seek a review and reversal *of the order* entered in this action on the same date *granting a new trial"* (R. 2181). On April 24, 1942, Maryland filed in the United States Circuit Court of Appeals for the Third Circuit a motion to dismiss that part of the appeal from the order, granting a new trial, in the alternative (R. 43a, Appendix to Appellee's Brief), and Petitioner filed answer to the motion (R. 45a).

On June 2, 1942, the Circuit Court, by Biggs, C.J., entered its order dismissing that portion of the appeal which seeks a review and reversal of the order of November 15, 1941 granting a new trial (R. 47a). Thereafter, the appeal by Petitioner from the judgment n.o.v. in favor of Maryland was argued before the United States Circuit Court of Appeals for the Third Circuit. On January 22, 1943, the Circuit Court entered its order dismissing the said appeal (R. 54a), and in connection therewith rendered an opinion by Maris, C.J., (R. 49a), reported in 132 F. (2d) 894.

Summary of Argument.

(1) Petitioner, in praying for a general review, seeks review and reversal of an order for a new trial in the alternative granted by the District Court which the Circuit Court had no jurisdiction to review (Judicial Code, Section 128) and which it would not review because the granting of a new trial is within the sound discretion of the Trial Court. This Court, for the same reason, has always refused to review new trial orders.

(2) The petition for the review and reversal of the order for a new trial in the alternative was probably not filed within the period prescribed by Rule 38 (2) of the Revised Rules of the United States Supreme Court and Section 8 of the Act of February 13, 1925, c. 229, (43 Stat. 936). The order of the Circuit Court dismissing that

portion of the appeal which seeks a review and reversal of the order granting a new trial was entered June 2, 1942 (R. 47a) and the petition for writ of certiorari herein was filed March 1, 1943.

(3) We also oppose the petition insofar as it seeks a review and reversal of the order of the Circuit Court entered January 22, 1943 dismissing the appeal from the judgment n.o.v. The Circuit Court in its opinion held that under *Montgomery Ward & Company* v. *Duncan,* 311 U. S. 243, the form of the order for a new trial in the alternative should have been phrased conditionally if "alternative in the sense of a succedaneum intended to take the place of a judgment n.o.v. only if and when that judgment should be vacated by reversal on appeal" and the Circuit Court stated that if the District Court had "inadvertently omitted the condition from the order", the District Court could still correct that order by inserting the condition. We submit that the District Court should be given an opportunity to correct its order without burdening the Supreme Court with the matter which is not presently such as to necessitate the granting of a writ of certiorari.

Argument.

(1)

Petitioner endeavors, as a part of a general review, to bring up to this Court for review an order of the District Court granting Maryland a new trial in the alternative (R. 2176). The District Court stated some of the reasons for the alternative new trial in an opinion filed November 15, 1941 (R. 2174) and reported in 42 Fed. Supp. 678. It reads, in part, as follows:

"(1) * * * the verdict was against the evidence, as it was far in excess of the cost of any repairs of the machines unless supplemented by the costs of investigation, reconstruction and redesigning. * * *

"(2) In addition to the foregoing matters it is felt that the court erred in admitting over objection or failing to strike certain testimony which affected the defendant injuriously. * * *

"* * * The manipulations, however, were such that no reasonable person could view some of them otherwise than as acts which, if performed at an election, would be criminal acts. This being so, the court should have prevented their introduction, as tending to mislead the jury as to the requirements of the contract. * * *"

Petitioner insisted before the Circuit Court, as it does here, that it was appealing from the judgment n.o.v. entered by the District Court in favor of Maryland (R. 2177) and that it claimed procedural rights in connection therewith to have reviewed the alternative order for a new trial. Petitioner's notice of appeal to the Circuit Court (R. 2181) reads in part as follows:

"* * * plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on November 15, 1941; and further, that, in this appeal from said final judgment, plaintiff will also seek a review and reversal of the order entered in this action on the same date granting a new trial."

On June 2, 1942, the Circuit Court, on motion of Maryland, entered an order dismissing that part of the appeal which sought a review and reversal of the order for a new trial (R. 47a).

In Maryland's motion for a new trial in the alternative, it assigned eighty-four reasons for a new trial (R. 2153).

The Trial Court, in its opinion, mentioned only a few of these reasons. Accordingly, if Petitioner is permitted to bring the order for a new trial before this Court on writ of certiorari, it will be necessary for this Court to review and pass upon all of the eighty-four reasons given by Maryland for the new trial in its motion before the District Court. It is the settled practice of this Court to deny certiorari where the purpose is merely to review the evidence or inferences drawn from it. *General Talking Pictures Corporation* v. *Western Electric Company, Inc.*, 304 U. S. 175; *Southern Power Company* v. *North Carolina Public Service Company*, 263 U. S. 508.

There is nothing extraordinary or peculiar about the order for a new trial in this case. The District Court followed the rule prescribed in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243 in entering its order for a new trial.

Maryland's motion before the Circuit Court to dismiss so much of the appeal as had to do with the review of the District Court's order for a new trial was based upon jurisdictional grounds. Section 128 of the Judicial Code (28 U. S. C. A., Section 225) limits the appellate jurisdiction of the Circuit Courts to a review of final decisions and they have no jurisdiction to review interlocutory orders except in those instances (a new trial order is not one of them) statutorily prescribed in Section 129 of the Judicial Code (29 U. S. C. A., Section 227, 227(a)). Moreover, the granting of a new trial is within the sound discretion of the trial judge and his discretion is not reviewable. The Circuit Courts are all in accord in holding that a new trial order is not reviewable either because they lack jurisdiction or because a new trial is within the discretion of the trial court. *Wright* v. *Taft-Pierce Mfg. Company*, 287 Fed. 131 (C. C. A.

1st); *Miller* v. *Maryland Casualty Co.*, 40 F. (2d) 463 (C. C. A. 2nd); *Dry Dock, E. B. & B. R. Co.* v. *Petkunas*, 261 Fed. 988 (C. C. A. 2nd); *Clement* v. *Wilson*, 135 Fed. 749 (C. C. A. 2nd); *Cohen* v. *Globe Indemnity Co.*, 120 F. (2d) 791 (C. C. A. 3rd); *Frank Mercantile Corporation* v. *Prudential Ins. Co.*, 115 F. (2d) 496 (C. C. A. 3rd); *Werner* v. *Zintmaster*, 77 F. (2d) 74 (C. C. A. 3rd); *Milton* v. *United States*, 120 F. (2d) 794 (C. C. A. 5th); *Sentinel Co.* v. *Dinwiddie*, 41 F. (2d) 57 (C. C. A. 7th); *Ft. Dodge Portland Cement Corporation* v. *Monk*, 276 Fed. 113 (C. C. A. 8th); *Libby, McNeill & Libby* v. *Malmskold*, 115 F. (2d) 786 (C. C. A. 9th); *Hunt* v. *United States*, 53 F. (2d) 333 (C. C. A. 10th).

Likewise, this Court has so held. *United States* v. *Socony Vacuum Oil Company, Inc.*, 310 U. S. 150, at 247; *Fairmount Glass Works* v. *Cub Fork Coal Company*, 287 U. S. 474.

Petitioner urges that the new trial order should be subject to review because it is based on an erroneous view of the law. There is no such exception to the rule. *Frank Mercantile Corporation* v. *Prudential Ins. Co.*, 115 F. (2d) 496 (C. C. A. 3rd). Furthermore, from the above quotations from the opinion of the Trial Court, it will be noticed that in addition to the law questions, the following reasons were given by the trial judge for the new trial: (1) the verdict was against the evidence, (2) the court erred in admitting over objection and failing to strike certain testimony which affected Maryland injuriously, (3) the testimony and demonstrations by expert witnesses on the machines were improperly admitted over objection of Maryland and injuriously affected its case, (4) certain requests for instructions more clearly defining the requirements of the contract were erroneously refused by the Trial

Court. To reach the conclusions he did, the trial judge weighed all the expert testimony, the non-expert testimony, the documentary proof and the law. The Trial Court observed how demonstrations on the machines were conducted, whether the machines were prepared properly, whether they were operated correctly, whether the instructions were followed and numerous other important facts. He saw the witnesses on the stand and their demeanor. He noted the effect of the testimony and demonstrations on the jury. Certainly he exercised a discretion in determining whether the erroneous admission of all this evidence injuriously affected Maryland.

Petitioner, in its effort to have this Court review the new trial order, unduly stresses the word "ordinarily" used in *Montgomery Ward & Company* v. *Duncan*, 311 U. S. 243, at page 254, where this Court said:

> "Should the trial judge enter judgment n. o. v. and, in the alternative, grant a new trial on any of the grounds assigned therefor, his disposition of the motion for a new trial would not ordinarily be reviewable, and only his action in entering judgment would be ground of appeal. If the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial."

This Court cited a number of cases for the statement that a new trial "would not ordinarily be reviewable". In all the cited cases, the question was one of jurisdiction. Thus, in *United States* v. *Young*, 94 U. S. 258, a new trial had been granted after the appeal had been taken but this Court refused certiorari stating that the Court of Claims had power to grant the new trial after the appeal had been taken, and this Court had no jurisdiction of the cause until final judgment. Subsequently, in *Young* v. *United States*, 95

U. S. 641, after the new trial was held, this Court refused to review the order for a new trial. In *Phillips* v. *Negley,* 117 U. S. 665, this Court did review the new trial because it had been granted by the District Court after the term had expired and therefore the question of the District Court's jurisdiction was involved. In *Hume* v. *Bowie,* 148 U. S. 245, this Court refused to review an order granting a new trial where the trial court had jurisdiction. In *Fairmount Glass Works* v. *Cub Fork Coal Company,* 287 U. S. 474, a case relied upon by Petitioner, this Court reversed the decision of the Circuit Court which had directed a new trial and affirmed the decision of the District Court which had denied the new trial. This Court refused to review the action of the District Court notwithstanding a jury had brought in a verdict of obviously inadequate damages for breach of contract.

There is nothing extraordinary in the instant case or in the new trial order. The Trial Court as we have seen, ordered the new trial because of its errors in admitting evidence, refusing to strike, as well as errors of law in refusing to charge. Nor is the instant case extraordinary because it took over a month to try, involves a record of over 2,000 pages, or because it is a suit by a political subdivision of the Commonwealth of Pennsylvania against a bonding company. The case in fact is a very simple one. It is a suit on a surety bond for alleged failure of the principal to perform the contract. The defenses were (1) *res judicata,* because, it was alleged, the issues had been decided in an action in which Petitioner and Poole, the principal of Maryland, were parties, in a case known as *Bassett* v. *Armstrong,* 309 Pa. 296, the trial of which had taken place ten years before the trial of this action, and (2) that there had been performance of the contract by Poole.

We submit that the United States Supreme Court should not review a new trial order which a Circuit Court has refused to review because it lacked jurisdiction to do so.

(2)

Sufficient has been said under (2) of our summary of argument, pages 3, 4, *supra*, about the timeliness of the petition under the rules without the need of more extended argument.

(3)

The Circuit Court, in its opinion, held that the entry by the Trial Court of the order for a new trial in the alternative thereby vacated the order for judgment n.o.v. entered the same day.

The order entered by the Trial Court read as follows:

> "And now, to wit, November 15, 1941, upon consideration thereof, the motion of the Maryland Casualty Company, defendant, for a new trial, alternative to its motion for judgment granted as of even date hereof, is hereby granted for reasons recited in the foregoing memorandum."

We believe that the order of the Trial Court sufficiently disclosed that it was conditional because it was "alternative" to the order entered giving Maryland judgment n.o.v. Nevertheless, the Circuit Court held that the order was unconditional but realized that the Trial Court "may well have intended that its new trial order should not be effective so long as the judgment for the defendant n.o.v. remained in effect and it inadvertently omitted the condition from the order". The condition that the Circuit Court had in mind was "the entry of an order granting a new trial as an alternative in the sense of a succedaneum intended to take the place of the judgment n.o.v. only if and

when that judgment should be vacated by reversal on appeal", and the Circuit Court, in its opinion, pointed out that the Trial Court might still so condition its grant of a new trial and reinstate the judgment n.o.v. Since the decision and the order of January 22, 1943 based thereon had only to do with the form of the order for a new trial entered by the District Court, it would seem that the more expeditious and proper procedure is for one of the parties to move before the District Court for its correction of its order in accordance with the opinion of the Circuit Court when the case is remanded to the District Court, and then the case can be properly brought before the Circuit Court for a decision on the merits.

Petitioner says that delay will result unless its petition for writ of certiorari and a general review is granted. Already, more delay has occurred by its adopting this procedure than would have occurred if prompt application had been made to the District Judge for a clarification of his order and for the entry of an order which the Circuit Court of Appeals indicated should be made. Had such prompt application been made, followed immediately by an appeal, this case might already have been heard with full argument before the Circuit Court of Appeals and be well on its way to a decision.

The procedure adopted by Petitioner would eliminate review by the Circuit Court of Appeals of the instant cause on its merits and deprive this Court of the benefit of the reasoned opinion of that Court. No valid reason can be advanced in this case, either because of the nature of the case or the questions involved, why such procedure should be had. In substance, Petitioner is seeking review of the refusal of the Circuit Court of Appeals to review the alleged error in granting the new trial by asking this Court (p. 14 of its petition) to grant it "a review, on writ of certiorari

* * *", and, "further, to order full hearing and argumen upon the merits of the questions involved in said appea * * *".

We submit that the District Court should be given a opportunity to correct its order, regardless of what ou views may be on the soundness of the Circuit Court' opinion, without burdening the Supreme Court with matter that has only to do with the form of an order rathe than substance, and which is not presently such as to necessi tate the granting of a writ of certiorari.

Petitioner seeks a writ of certiorari "to order full hear ing and argument upon the merits of the questions involve in said appeal to the end that this litigation may be finall determined in this Court", notwithstanding that the Ci cuit Court has not passed upon the merits of the ques tions involved. It is the settled practice of this Court no to pass upon the merits until the Circuit Court has reviewe them.

It is needless to say that Maryland does not conced any error in the award of an alternative new trial, an particularly does not concede any error in the entry o the judgment n.o.v. The opinions of the learned Distric Judge amply vindicate the conclusions reached by him.

(4)

The petition for writ of certiorari should be denied.

Respectfully submitted,

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